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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of: JERRIS S. KELLER, Petitioner/Appellee, and JAMES E. KELLER, Respondent/Appellant.	2 CA-CV 2010-0101 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO200600477

Honorable Stephen M. Desens, Judge

AFFIRMED

Law Offices of Brian Kimminau
By Brian Kimminau
Tucson
Attorney for Petitioner/Appellee

Bays Law PC
By P. Randall Bays
Sierra Vista
Attorney for Respondent/Appellant

V Á S Q U E Z, Presiding Judge.

¶1 James Keller appeals from the trial court's order granting, in part, a petition to modify spousal maintenance filed by his former wife, appellee Jerris Keller. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *In re Marriage of Yuro*, 192 Ariz. 568, ¶ 3, 968 P.2d 1053, 1055 (App. 1998). The parties' marriage was dissolved in July 2007. Under the dissolution decree, Jerris was awarded spousal maintenance "for a limited time until she [became] eligible for social security," with monthly payments of $637.00 until June 2007, and $425.75 per month thereafter until June 2010. In October 2009, Jerris filed a petition to modify the spousal maintenance award, seeking an increase in the amount and duration of the award. After a hearing in February 2010, the court issued an order denying Jerris's request for an increase in monthly payments but extending the duration of the $425.75 award "until further order of th[e] Court or [Jerris's] death or remarriage." The court denied James's motion for new trial but granted James's request to revise the order to reflect spousal maintenance would terminate upon the death of either party and not just on Jerris's death, as the court originally ordered. This appeal followed.

Discussion

¶3 James essentially contends the trial court erred as a matter of law when it found there was a substantial and continuing change of circumstances warranting

modification of the spousal maintenance award.[1] We review a trial court's decision to modify a spousal maintenance award for abuse of discretion. *Waldren v. Waldren*, 212 Ariz. 337, ¶ 12, 131 P.3d 1067, 1069 (App. 2006), *vacated in part on other grounds by In re Marriage of Waldren*, 217 Ariz. 173, 171 P.3d 1214 (2007). "An abuse of discretion occurs if a court commits an error of law in the process of reaching a discretionary conclusion." *In re Marriage of Robinson*, 201 Ariz. 328, ¶ 5, 35 P.3d 89, 92 (App. 2001).

¶4 Under § 25-319(A), A.R.S., a trial court may order one spouse to pay spousal maintenance to the other if it finds that the spouse seeking maintenance:

> 1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.
>
> 2. Is unable to be self-sufficient through appropriate employment . . . or lacks earning ability in the labor market adequate to be self-sufficient.
>
> 3. Contributed to the educational opportunities of the other spouse.
>
> 4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

[1]Jerris contends that "this Court is mandated to find that the trial court's decision to modify spousal maintenance was supported by the absent record, and that the trial court did not abuse its discretion." But the cases Jerris cites in support of her contention involved claims that the evidence did not support the trial court's decision and the appellants were referring to non-certified copies of transcripts or had attached to their briefs transcripts that were not part of the record. *See Kline v. Kline*, 221 Ariz. 564, ¶ 33, 212 P.3d 902, 910 (App. 2009); *Baker v. Baker*, 183 Ariz. 70, 72-73, 900 P.2d 764, 766-67 (App. 1995). Thus, *Kline* and *Baker* are inapposite.

The court must also consider numerous other factors in determining the amount and duration of the award, including, inter alia, the supporting spouse's ability to pay, the comparative earning power of the spouses, the duration of the marriage, and the contributions of the supported spouse to the supporting spouse's earning ability. § 25-319(B). "[T]he provisions of any decree respecting maintenance or support may be modified . . . only upon a showing of changed circumstances which are substantial and continuing." A.R.S. § 25-327(A). And, the changed circumstances for modification of spousal maintenance "is clearly a reference to the economic circumstances that justified the original award, as set forth in § 25-319." *Smith v. Mangum*, 155 Ariz. 448, 451, 747 P. 2d 609, 612 (App. 1987).

¶5 In modifying spousal maintenance from a fixed period to an indefinite duration, the trial court found "[Jerris] clearly lacks sufficient property and income, including all of the property and assets awarded to her in the Decree of Dissolution, to provide for her reasonable and known needs." The court reasoned that if it were to allow "the current spousal maintenance payment to terminate in June of 2010, then clearly [Jerris] would suffer a substantial and material change in circumstances."

¶6 On appeal, James argues "the trial court did not make any findings whatsoever that would constitute a substantial and continuing change in circumstances that were not anticipated or foreseeable at the time the decree was entered or that occurred since the decree was entered." He relies primarily on *Linton v. Linton*, 17 Ariz. App. 560, 563, 499 P.2d 174, 177 (1972), for the proposition that the changed circumstances justifying a modification of spousal maintenance must be circumstances

that occurred after the entry of the original decree. Although the proposition is sound generally, we disagree that the trial court failed to make the appropriate findings.

¶7 In *Linton*, the parties had agreed upon the amount and duration of spousal maintenance in a property settlement agreement, which the husband sought to modify nine months after the decree was entered. This court reversed the trial court's order finding there was a substantial and continuing change in circumstances and modifying the husband's obligation, because the parties had been aware of the husband's impending retirement, knew what his retirement income would be, and had structured the spousal maintenance terms with those facts in mind. *Id.* at 561, 499 P.2d at 177. But as we stated in *Chaney v. Chaney*, 145 Ariz. 23, 26, 699 P.2d 398, 401 (App. 1985), "*Linton* is essentially based upon the principle that the court will look with disfavor upon a party who attempts to evade contractually agreed upon spousal maintenance responsibilities by asserting a change of circumstances when the parties originally made their agreement with such changes in mind." Here, as in *Chaney*, there was no property settlement agreement. Although the parties had apparently stipulated that James would pay some spousal maintenance for a limited period, the parties had not agreed on the amount or whether the award could be later modified by the trial court. Thus, the award was as much a product of the court's decree after a trial on the issues as it was the result of any agreement the parties may have reached. "Therefore, the appropriate inquiry [was] . . . whether the initial decree preclude[d] the subsequently requested modification." *Id.* And "if a decree is silent as to modifiability, the trial court may . . . modify the decree to . . . lengthen the term of periodic payments upon a showing of a substantial and continuing

change of circumstances affecting the purpose underlying the original spousal maintenance order." *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989).

¶8 James maintains that the "original purpose of the spousal maintenance award was to provide [Jerris] additional income for a 'limited time until she is eligible for social security'. . . That purpose was realized when [she] began receiving social security." (quoting the amended decree). Although, as James asserts, public policy may favor a limited period of spousal maintenance, an indefinite period becomes acceptable upon a showing that Jerris is unlikely to achieve independence. *In re Marriage of Zale*, 193 Ariz. 246, ¶ 17, 972 P.2d 230, 234 (1999). This is precisely what the trial court found.

¶9 In *Schroeder*, our supreme court recognized that the award of spousal maintenance involves a consideration of the justifiable expectations of both parties. The court observed that "the expectations of the spouses may be far from like-minded. The paying spouse's expectation may be to achieve certainty regarding the obligation. The expectation of the receiving spouse may be to achieve self-sufficiency." 161 Ariz. at 321, 778 P.2d at 1217. The court noted that examining the "justified expectations of both spouses . . . can best be given effect by allowing a court to consider whether a substantial and continuing change of circumstances has prevented those expectations from being realized. If so, a modification of the length of the award may promote the original expectations." *Id.* at 322, 778 P.2d at 1218.

¶10 Implicit in the trial court's initial award of spousal maintenance was the expectation that a limited period of spousal maintenance would be sufficient. In modifying the duration of the award it is apparent the court determined the expectation that Jerris would achieve financial independence upon receiving social security was "unrealized in this case." *Schroeder*, 161 Ariz. at 323, 778 P.2d at 1219; *see also Rainwater v. Rainwater*, 177 Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993). It was this unrealized expectation that constituted a substantial and continuing change in circumstances. And, in the absence of a transcript of the proceedings,[2] we do not find the court's order extending the duration of the award indefinitely unsupported by the evidence or an abuse of discretion.[3] *Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

¶11 James argues, however, that he should not be held responsible for Jerris's decision to accept social security at a lower amount before reaching the age of sixty-five. But voluntary actions that reduce income do not necessarily preclude a modification of spousal maintenance payments. For example, in *Chaney* this court held the voluntary retirement of the paying spouse did not preclude a downward adjustment of spousal maintenance payments where the paying spouse was sixty-five years old at the time of

[2]Apparently no court reporter was present, nor was one requested.

[3]James additionally argues the reduction in the value of Jerris's IRA could not constitute changed circumstances because the decrease is temporary in nature. Although he is correct that "temporary present losses and speculative future losses . . . are simply not sufficient to support a modification," nothing in the case he cites in support of his argument, *Scott v. Scott*, 121 Ariz. 492, 591 P.2d 980 (1979), suggests the decrease in the value of Jerris's IRA was temporary. Again, in the absence of a transcript, we presume the evidence supported the trial court's order. *Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

retirement, in poor health, and did not retire in bad faith to avoid making further payments. 145 Ariz. at 27, 699 P.2d at 402. Nothing in the record suggests that Jerris acted in bad faith in order to obtain a modification in spousal maintenance.

¶12 Finally, although James acknowledges that a trial court may, under appropriate circumstances, award spousal maintenance until death or remarriage, he argues that the court must, "at a minimum . . . explain what, if any, factors . . . outweigh the public policy that ordinarily requires some effort toward independence by the party requesting maintenance." *See Hughes v. Hughes*, 177 Ariz. 522, 525, 869 P.2d 198, 201 (App. 1993). James contends the trial court did not do this. Because James raises this issue for the first time on appeal, it is waived. *See Airfreight Express, Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007).

Disposition

¶13 For the reasons stated above, we affirm.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge